



Federal Communications Commission
Washington, D.C. 20554

April 9, 2007

In Reply Refer to:
1800B3-LAS/JP

Fifth Estate Broadcasting, LC
11337 Ashcake Road
Ashland, VA 23005

Clear Channel Broadcasting Licenses, Inc.
2625 S. Memorial Drive, Suite A
Tulsa, OK 74129

Lawrence and Margaret Loesch
2422 South Wrightsville Avenue
Nags Head, NC 27959

Radio Disney Group, LLC
Attn: John W. Zucker, Esq.
77 West 66th Street, 16th Floor
New York, NY 10023-6298

Re: **AM Auction No. 84**
MX Group 84-110

Fifth Estate Broadcasting, LC
WHAN(AM), Victoria, Virginia
Facility ID No. 8438
File Nos. BMJP-20040130AGB and
BMJP-20051031ACR

Clear Channel Broadcasting Licenses, Inc.
WCND(AM), Ruckersville, Virginia
Facility ID No. 60083
File No. BMJP-20040130AZQ

Lawrence and Margaret Loesch
WZBO(AM), Edenton, North Carolina
Facility ID No. 36765
File No. BMJP-20040130BMG

Radio Disney Group, LLC
WWJZ(AM), Horsham Township, Pennsylvania
Facility ID No. 43904
File No. BMJP-20040129AHX

**Applications for AM Station
Construction Permits**

Dear Applicants:

We have before us four mutually exclusive (“MX”) AM construction permit applications. Fifth Estate Broadcasting, LC (“Fifth Estate”) proposes to change the community of license of Station WHAN(AM) from Ashland, Virginia, to Victoria, Virginia. Clear Channel Broadcasting Licenses, Inc. (“Clear Channel”) proposes to change the community of license of Station WCND(AM) from Shelbyville, Kentucky, to Ruckersville, Virginia. Lawrence and Margaret Loesch (the “Loeschs”) propose to change the frequency for Station WZBO(AM), Edenton, North Carolina, from 1260 kHz to 650 kHz. Radio Disney Group, LLC (“Disney”) proposes to change the community of license of Station WWJZ(AM) from Mt. Holly, New Jersey, to Horsham Township, Pennsylvania. The four applications were designated MX Group 84-110 in AM Auction No. 84. We also have before us two Joint Petitions for Approval of Agreements (“Joint Petition(s)” or “Settlement Agreement(s)”), one filed October 28, 2005, by Fifth Estate and the Loeschs, and the second filed October 31, 2005, by Fifth Estate and Clear Channel. As discussed below, we approve both of the Settlement Agreements, dismiss the Clear Channel and the Loesch applications, accept Fifth Estate’s October 31, 2005, Form 301 long-form application for filing, and invite Disney to file its Form 301 long-form application within 60 days of the date of this letter for a construction permit for WWJZ(AM) in Horsham Township, Pennsylvania.

Background. On June 15, 2005, the Media Bureau released a *Public Notice* containing a list of 802 MX AM Auction No. 84 window-filed Form 301 tech box applications.¹ The *AM MX Public Notice* defined three categories of MX applications, detailed the filings required for each category, and specified a September 16, 2005, deadline for submitting the required filings to the Commission. This filing deadline was extended to October 31, 2005, because of Hurricane Katrina.² MX Group 84-110 was listed as a Category I MX group, eligible for settlement. Category I applicants were required to file a settlement agreement, an engineering solution resolving all mutual exclusivities, or a Section 307(b) showing by the filing deadline.

Accordingly, on October 28, 2005, Fifth Estate and the Loeschs filed a Settlement Agreement. Under the terms of the Settlement Agreement, Fifth Estate is to pay the Loeschs \$8,610 to dismiss their application. On October 31, 2005, Fifth Estate and Clear Channel filed a Settlement Agreement.³ Under the terms of the Settlement Agreement, Fifth Estate is to pay Clear Channel \$5,220 to dismiss its application. Both Settlement Agreements contain the affidavits required by Section 73.3525(a) of the Commission’s Rules (“Rules”).⁴ In addition, on October 31, 2005, Fifth Estate filed a long-form application (Form 301), File No. BMJP-20051031ACR, seeking to implement the community of license change for Station WHAN(AM) to Victoria, Virginia. Fifth Estate also filed a Section 307(b) showing for the community of license change on October 31, 2005.

¹ See *AM Auction No. 84 Mutually Exclusive Applicants Subject to Auction, Settlement Period Announced for Certain Mutually Exclusive Application Groups; September 16, 2005 Deadline Established for Section 307(b) Submissions*, Public Notice, 20 FCC Rcd 10563 (MB 2005) (“*AM MX Public Notice*”).

² See *Auction No. 84 Settlement Period and Section 307(b) Submission Deadline Extended to October 31, 2005*, Public Notice, 20 FCC Rcd 14492 (MB 2005).

³ On November 3, 2005, Clear Channel filed a Supplement to the Joint Petition.

⁴ 47 C.F.R. § 73.3525(a).

Discussion: *The Joint Petitions.* After careful consideration of the Joint Petitions, the Settlement Agreements, and the attached declarations and affidavits, we find that approval of the Joint Petitions and the associated Settlement Agreements would serve the public interest and expedite the provision of new AM service. The applicants have complied with the provisions of Section 311(c)(3) of the Communications Act of 1934, as amended (the “Act”), and Section 73.3525(a) of the Rules.⁵ We further find that neither Clear Channel nor the Loeschs filed their respective applications for the purpose of reaching or carrying out the Settlement Agreements.⁶

Section 307(b) Issues. Republication. Since the applicants propose to serve different communities, the parties have demonstrated that dismissal of the Clear Channel and the Loesch applications would not unduly impede the objectives of Section 307(b) of the Act.⁷ Accordingly, we will not require republication under Section 73.3525(b) of the Rules.⁸

Fifth Estate 307(b) Analysis. As noted above, Fifth Estate proposes to change the community of license of Station WHAN(AM) from Ashland, Virginia, to Victoria, Virginia. Applicants proposing an AM station community of license change must demonstrate that the modification proposal will result in a preferential arrangement of assignments under Section 307(b) compared to the existing station assignment. Our evaluation of the modification proposal is guided by the directive of Section 307(b) to ensure a “fair, efficient and equitable distribution of radio service.”⁹ Consideration of the comparison is based on the FM allotment priorities. The Commission has noted that the FM allotment priorities fulfill its obligation under Section 307(b), and would apply in making a Section 307(b) determination regarding AM applications.¹⁰

Fifth Estate proposes a first local service to Victoria, Virginia, and claims preference under Priority (3) of the applicable allotment priorities. Where, as in this instance, Fifth Estate’s proposed AM station’s 5 mV/m contour will cover a significant portion of an Urbanized Area, we do not automatically award a first local service preference.¹¹ Rather, we have used the criteria set forth in *Faye and Richard*

⁵ See 47 U.S.C. § 311(c)(3); 47 C.F.R. § 73.3525(a).

⁶ See 47 C.F.R. § 73.3525(a)(2).

⁷ In this regard, Clear Channel proposes a second local service to the community of Ruckersville, and the Loeschs propose only a frequency change to an existing station.

⁸ 47 C.F.R. § 73.3525(b). See *Mobile Broadcasting Service, Inc.*, Memorandum Opinion and Order, 91 FCC 2d 1209 (1982); *Waterman Broadcasting Corp. of Texas*, Memorandum Opinion and Order, 10 FCC 2d 712 (Rev. Bd. 1967) (rule designed to preclude the artificial removal of a demand, evidenced by the filing of an application, for a local outlet of self-expression by private agreement among the applicants).

⁹ 47 U.S.C. § 307(b).

¹⁰ See *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88 (1982). The FM allotment priorities are as follows: (1) First fulltime aural service; (2) Second fulltime aural service; (3) First local transmission service; and (4) Other public interest matters. Co-equal weight is given to Priorities (2) and (3). The FM allotment priorities were first applied to Section 307(b) determinations in mutually exclusive AM proceedings in *Alessandro Broadcasting Co.*, Decision, 56 RR 2d 1568 (Rev. Bd. 1984).

¹¹ Fifth Estate’s proposed AM station will place a daytime 5 mV/m contour over 75.6 percent of the Richmond, Virginia, Urbanized Area.

Tuck (“*Tuck*”)¹² as a guideline in determining whether the proposed community has an identity distinct from the Urbanized Area, and is therefore entitled to consideration for a first local transmission service. First Estate has supplied a *Tuck* showing demonstrating that Victoria meets a majority of the eight *Tuck* factors.¹³ We therefore find that the preponderance of the evidence submitted supports the conclusion that Victoria is separate and distinct from Richmond, and Fifth Estate’s application meets the criteria for a preference under Priority (3) of the allotment priorities as a first local transmission service.¹⁴

Furthermore, Fifth Estate’s proposal to change its community of license from Ashland to Victoria will not remove the sole local service from Ashland because there is currently one other radio station licensed to Ashland, WYFJ-FM. The proposed allotment to Victoria would provide a first local service, Priority (3), whereas the retention of Station WHAN(AM) at Ashland, attributes to a second local service under Priority (4). Thus, we find that the Fifth Estate proposal results in a preferential arrangement of assignments based on Priority (3), first local service.

The Disney Proposal: Because the WHAN(AM) long-form application eliminates the mutual exclusivity between WHAN(AM) and the Disney proposal, and the Clear Channel and the Loesch applications are dismissed pursuant to the Settlement Agreements, the Disney proposal is no longer mutually exclusive to any application in MX Group 84-110. Accordingly, we direct Disney to file a complete FCC Form 301 application.

Conclusion / Action. Accordingly, IT IS ORDERED, that the Joint Petitions for Approval of Agreements are GRANTED and the associated Settlement Agreements ARE APPROVED. The applications filed by Clear Channel Broadcasting Licenses, Inc. (File No. BMJP-20040130AZQ) and Lawrence and Margaret Loesch (File No. BMJP-20040130BMG) ARE DISMISSED. The long-form application (Form 301), File No. BMJP-20051031ACR, filed by Fifth Estate Broadcasting, LC IS ACCEPTED FOR FILING.

Additionally, IT IS ORDERED, that Radio Disney Group, LLC, within 60 days of the date of this letter, is to file a complete FCC Form 301 long-form application in connection with its application for a construction permit for an AM broadcast station at Horsham Township, Pennsylvania (File No. BMJP-20040129AHX), pursuant to the procedures set forth in the Commission’s Rules.¹⁵ With its application, Disney must simultaneously submit the required filing fee for a new commercial AM radio station and an FCC Form 159, Remittance Advice.

The facilities proposed in the FCC Form 301 must comply with all applicable AM rules. Any differences between the tech box proposal filed during the AM Auction No. 84 filing window and the

¹² *Faye and Richard Tuck*, Memorandum Opinion and Order, 3 FCC Rcd 5374 (1988).

¹³ In its 307(b) showing, Fifth Estate supplied evidence demonstrating that Victoria has its own post office and zip code; its own weekly newspaper that covers the community’s local needs and interests; its own elected government consisting of a mayor and town council; numerous commercial establishments (including health care facilities); its own fire and police departments, and traditional municipal services; and finally, that Victoria and Richmond are likely in different advertising markets due to their geographic separation. *See id.* at 5378.

¹⁴ Furthermore, we find that Victoria, Virginia, is a Census Designated Place, thus it constitutes a community suitable for licensing purposes. *See Arnold and Columbia, California*, Memorandum Opinion and Order, 7 FCC Rcd 6302, 6303 (MMB 1992).

¹⁵ *See* 47 C.F.R. §§ 0.401(b), 1.1104, 1.1109, 73.5005(d), and 73.3512.

complete FCC Form 301 must be minor changes, as defined by the applicable AM service rules,¹⁶ and must not create new application conflicts. The complete FCC Form 301 application must be filed electronically through the Media Bureau's Consolidated Database System (CDBS) online electronic forms system. For information regarding electronic application filing, refer to the April 28, 2000, Public Notice, *Mass Media Bureau Implements Consolidated Database System (CDBS) Electronic Filing of FCC Forms 301, 302, 314, 315, 316, and 347*. When filing the complete FCC Form 301, an applicant must select "Long Form Application for AM Auction No. 84" on the Pre-form for Form 301 (Question 2 – Application Purpose). In addition, the CDBS file number previously issued to the tech box submission filed in the AM Auction No. 84 filing window must be entered on the Pre-form in the field "Eng. Proposal File Number." Instructions for use of the electronic filing system are available in the CDBS User's Guide, which can be accessed from the electronic filing website at <http://www.fcc.gov/mb/elecfile.html>. For assistance with electronic filing, call the Audio Division Help Desk at (202) 418-2662.

The staff will return an application not submitted in accordance with the procedures described above. Failure to timely file the complete FCC Form 301 application will result in dismissal of the tech box proposal filed during the AM Auction No. 84 filing window for failure to prosecute, pursuant to Section 73.3568 of the Commission's Rules.¹⁷

Sincerely,



Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Lauren A. Colby, Esq.
Mark N. Lipp, Esq.
Ben Davis, Esq.
Phil Marchesiello, Esq.

¹⁶ *Id.* § 73.3571.

¹⁷ *Id.* § 73.3568.